

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

FILED

MAR 23 2006

CLERK, U.S. DISTRICT COURT,
WESTERN DISTRICT OF TEXAS
BY DM
DEPUTY CLERK

IMMUNOCEPT, LLC, PATRICE ANNE §
LEE, AND JAMES REESE MATSON, §

Plaintiffs, §

v. §

CAUSE NO. A-05-CA-334- SS

FULBRIGHT & JAWORSKI, LLP, §

Defendant. §

**FULBRIGHT & JAWORSKI, LLP'S OBJECTIONS TO AND MOTION TO STRIKE
PLAINTIFFS' APPENDIX AND EXHIBITS TO THEIR
RESPONSE TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT**

COMES NOW Defendant Fulbright & Jaworski, LLP ("Fulbright") and files its objections and motion to strike Plaintiffs' Appendix attached to their Response to Defendant's Motion for Summary Judgment, and in support thereof would respectfully show this Court as follows:

On March 10, 2006, Plaintiffs filed their Response to Fulbright's Motion for Summary Judgment, and attached an "Appendix in Support of Their Response to Defendant's Motion for Summary Judgment" (hereinafter "Appendix"). The Appendix, including its purported "Statement of Facts" and "Summary Judgment Evidence," is filled with attorney argument, hearsay and inadmissible "evidence." Fulbright files these objections and respectfully requests the Court to strike Plaintiffs' Appendix as follows:

A. "Summary of Facts"

Although Plaintiffs label their Appendix as a "Summary of Facts," it is filled with nonfactual attorney argument attached as an "Appendix" in a calculated effort to circumvent the Court's briefing page limitations. That the summary is not factual is evident from the very first

heading, which misleads the Court via its claim that “Plaintiffs develop a ... life saving treatment for sepsis.” (Appendix at 1). Plaintiffs’ invention has never saved a single life. Indeed, Plaintiffs have never tested it in humans. The only limited tests (by someone else in Germany) of a large pore hemofilter on humans did not demonstrate a survival benefit, much less “save” lives. In fact, more persons died in the tests of a large pore hemofilter than those who were treated with a conventional sized hemofilter. Such evidence contradicts the attorney argument in Plaintiffs’ “Summary of Facts” that Plaintiffs have a “life-saving” treatment and that their invention is “on the cusp” of “final confirmation” of its efficacy in treating sepsis. These fallacies in the plaintiffs’ “Summary of facts” are just the tip of the iceberg.

Defendant objects to Plaintiffs’ “Summary of Facts” because it is not factual; it is attorney argument, and Defendant requests that it be stricken.

B. “Summary Judgment Evidence”

Defendant objects to and requests the Court to strike the following exhibits included in Plaintiffs’ “Summary Judgment Evidence” in the Appendix.

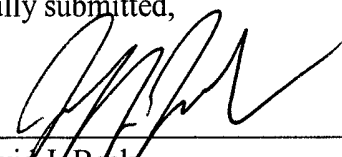
<u>EXHIBITS</u>	<u>OBJECTIONS</u>
1	Hearsay FRE 702. Defendant has moved the Court to exclude the opinions of Rinaldo Bellomo pursuant to <i>Daubert</i> and Rule 702. Defendant incorporates its previously-filed <i>Daubert</i> motion here.
2	Hearsay FRE 702. Defendant has moved the Court to exclude the opinions of James Malackowski pursuant to <i>Daubert</i> and Rule 702. Defendant incorporates its previously-filed <i>Daubert</i> motion here.

<u>EXHIBITS</u>	<u>OBJECTIONS</u>
3	Hearsay FRE 70. Defendant has moved the Court to exclude the opinions of James Malackowski pursuant to <i>Daubert</i> and Rule 702. Defendant incorporates its previously-filed <i>Daubert</i> motion here.
4	Hearsay FRE 702. Defendant has moved the Court to exclude the opinions of James Malackowski pursuant to <i>Daubert</i> and Rule 702. Defendant incorporates its previously-filed <i>Daubert</i> motion here.
5	Hearsay FRE 702. Defendant has moved the Court to exclude the opinions of Alan MacPherson pursuant to <i>Daubert</i> and Rule 702. Defendant incorporates its previously-filed <i>Daubert</i> motion here.
6	Hearsay
7	Hearsay
8	Hearsay
9	Hearsay
10	Hearsay; FRE 402, 403.
12	FRE 702. Defendant has moved the Court to exclude the opinions of Rinaldo Bellomo pursuant to <i>Daubert</i> and Rule 702. Defendant incorporates its previously-filed <i>Daubert</i> motion here.
18	Hearsay (Depo. pp181-191)
22	Hearsay (Depo. pp. 123-124)
25	Hearsay
27	Hearsay
28	FRE 702. Defendant has moved the Court to exclude the opinions of Alan MacPherson pursuant to <i>Daubert</i> and Rule 702. Defendant incorporates its previously-filed <i>Daubert</i> motion here.
30	Hearsay

<u>EXHIBITS</u>	<u>OBJECTIONS</u>
31	Hearsay

Respectfully submitted,

By: _____


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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing document was served as shown below on counsel of record on March 22, 2006.

Via Certified Mail, Return Receipt Requested

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